IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BOARD OF EDUCATION OF COLONIAL SCHOOL DISTRICT, Appellant, v. COLONIAL EDUCATION ASSOCIATION, Appellee.	)	Civil Action No. 14383

MEMORANDUM OPINION

Date Submitted: February 1, 1996
Date Decided: February 28, 1996

David H. Williams, Esquire and Paul P. Rooney, Esquire, of MORRIS, JAMES, HITCHENS & WILLIAMS, Wilmington, Delaware; Attorneys for Appellant.

Teresa C. Fariss, Esquire, of YOUNG, CONAWAY, STARGATT & TAYLOR, Wilmington, Delaware; Attorney for Appellee.

ALLEN, Chancellor

This an appeal from the June 25, 1995 determination of the Public Employment Relations Board ("PERB") that the Board of Education of Colonial School District is guilty of an unfair labor practice under Section 4007(a)(1) and (a)(5) of title 14 of the Delaware code.[1] Appellee is Colonial Education Association, a collective bargain agent for teachers and others employed by Colonial School District (the "District").

The dispute arises over a three day suspension from work without pay imposed by the District upon Mr. John H. Briggs, Sr., a music teacher employed by the District at the Gunning Bedford Middle School. The discipline was imposed as a result of a determination by the District that Mr. Briggs had engaged in conduct that was "insubordinate, unprofessional, and gives the appearance of sexual harassment directed towards female students." The gist of the District's basis for taking this disciplinary action is set forth in a communication sent to Mr. Briggs by Principal Kenneth Falgowski following a January 17, 1995 conference between Principal Falgowski and Mr. Briggs and a representative of the Association. Three incidents of inappropriate conduct were discussed at that meeting. The first dealt with an incident that was reported to have occurred on December 19, 1994:

> I reviewed the following details of my interviews with three Gunning Bedford students regarding an incident that took place on December 19, 1994. The alleged victim and both witnesses stated that on the way to the afternoon activity buses, you hugged the alleged victim from the side and kissed her on the forehead. The alleged victim stated that after kissing her you said, "Don't you like the feel of those luscious lips." Although the kiss was confirmed by both witnesses, neither witness heard this statement. One witness stated she heard you tell

[1]Jurisdiction over the appeal is conferred by Section 4009(a) of Title 14 of the Delaware Code.

the alleged victim not to rub the kiss off or spiders would come out of her head. The other witness did not hear any statements made. The alleged victim informed me that your actions were offensive, caused her anxiety, and made her mad and angry.

Stipulation of Facts Exh. A.

The second instance discussed occurred on December 21, 1994:

I reviewed with you the details of an incident that took place on the morning of December 21, 1994, while you were on bus duty. Assistant Principals, Mr. Ron Brown, and Ms. Susan Fols observed an eighth grade female student exit the bus and give you a kiss on your cheek. You did not admonish, discourage nor react negatively in any manner. You simply said, "Good Morning Honey." That afternoon, Mr. Brown asked you for the name of the student that kissed you and you replied, "Oh, I don't know." Mr. Brown told you that you should not have students kissing you. You responded that you had already informed [name deleted by Court of Chancery], a seventh grade student, not to kiss you anymore. You admitted this incident took place and stated the student initiated the kiss.

Id.

The third instance of inappropriate behavior reportedly occurred on October 11, 1994:

I reviewed with you the details of an incident that took place on October 11, 1994, in the South Staff Center. A counselor went into the conference area and saw you with a distraught student. You had both arms around her holding her very tightly as she was sobbing. The student had her head leaning on your chest. You spoke very softly to her, telling her everything would be all right. As the counselor unlocked her office door, she witnessed you kiss the top of the student's head. The three of you entered the counselor's office and the student sat in a chair. Before leaving, you bent over, wrapped both arms around the student and kissed on the left cheek. In a conference with me on October 12, 1994, you admitted this incident took place as stated. In our conference, I informed you that your actions were inappropriate and that you were not to touch students in such inappropriate ways. I directed you not to kiss or hug students, nor have students kiss or hug you.

Id.

The District's written policy on Sexual Harassment provides in part as follows:

Sexual harassment shall consist of unwelcomed sexual advances, requests for sexual favors or other inappropriate verbal or physical conduct of a sexual nature when any of the following conditions exist:

* * *

3. Such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile, or offensive employment or educational environment. The harasser may be an employee or a student.

* * *

5. Inappropriate touching.

If the matters set forth in Mr. Falgowski's letter are true, (and there appears to be no issue with respect to two of them) they certainly constitute just cause for the imposition of proportionate discipline.[2]

I.

The process leading to the meeting of January 17 in a sense commenced on December 20, 1994 when Mr. Falgowski received a complaint from a seventh grader that she had been kissed on the forehead by Mr. Briggs the previous day and he had put his arm around her. The girl reported that she was upset by this. Mr. Falgowski, who according to the recitation in his January 17 letter, had earlier warned Briggs about this sort of inappropriate behavior, commenced an investigation. First, Falgowski in the presence of others interviewed the students whom he had been told were present. He

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[2]Astonishingly, the decision of the Executive Director, which was accepted by PERB, states:

> In two (2) out of three (3) instances cited in Mr. Falgowski's letter of January 17th the record provides no basis for concluding that the students *were afraid or otherwise distressed in any way by the incidents* in question. (Emphasis added).

While this statement itself may be literally correct, its implication needs to be addressed and repudiated. Despite any degree of legalistic interpretation that an attorney or other interpreter of rules, contracts, statutes etc., may chose to give the written word of the District's written Sexual Harassment Policy, there is no need for the District to show student "fear" or "distress" in connection with a decision that inappropriate teacher conduct warrants sanction. To state what should be obvious: Where relations between children and adults are concerned even contact that is accepted or even invited by a child may quite properly be sanctioned. Children can be seduced by those they trust even if they cannot consent in law. Thus, that a teacher wheedles a relationship with a seventh grader in which he is able to inappropriately touch or to kiss without threats or without invoking fear or distress, presents no reason whatsoever to conclude that such touches or kisses are not strictly forbidden and do not violate the particular words of the Sexual Harassment Policy.

discussed an earlier incident with other teachers. He took notes of these interviews as did others present. On January 17, Mr. Falgowski conducted the conference with Mr. Briggs and Briggs' Association representative referred to above. Briggs denied recalling the incident of December 19.

On January 30, Dr. Henry Rose the District's Director of Human Resources independently conducted interviews similar to those that Falgowski had conducted. Dr. Rose arrived unannounced at the school and interviewed the girls involved with the December 19 incident. He reviewed the histories of the students as well. He found them to offer accounts that were consistent with each other and with that reported to Falgowski.

After consideration of the matter, on January 31 the District imposed the limited sanction of a three day suspension on Mr. Briggs because of "conduct that is considered to be insubordinate, unprofessional, and gives the impression of sexual harassment directed toward female students."

Briggs sought to grieve this determination under the collective bargaining agreement governing his employment. That agreement provides that "no employee shall be disciplined...except for just cause." In connection with the filing of that grievance the Association, as Briggs' collective bargaining representative, sought from the District the identity of both the child who it was claimed was inappropriately touched on December 19 and of the two student witnesses. (The identity of the little girl who kissed Briggs on

December 21, without correction from him, was already known to Briggs.) The Association claimed it is obligated to decide whether it will continue to press Mr. Briggs' grievance on his behalf and must conduct an investigation of the facts in order to do so. Thus, according to the Association, in order to meet its statutory responsibility under the comprehensive regulation of public school employment, it requires to know the names of the students involved in the December 19, 1994 incident.

The District declined to identify the students, claiming an obligation to protect their confidentiality and asserting that, considering all of the circumstances, the Association had sufficient information to represent Briggs with respect to his grievance.

II.

On February 14, 1994 the Association filed a Charge of Unfair Labor Practice against the District before the PERB in an effort to force the District to disclose the names of the children involved. The District still declined to do so, but did turn over to the Association what it asserted were all of the materials generated in its investigation of the student's complaint. Those materials are appended to the Stipulation of Facts in this proceeding. They include notes made by several persons in connection with a number of student interviews. The notes were redacted to exclude the identity of any student

interviewed. Wholly aside from the allegations involved in the arguments before PERB, those notes appear to reflect incidents of gross unprofessionalism.[3]

In the proceeding before PERB the District claimed that it had afforded to the Association sufficient information to allow it to function appropriately and that it was bound to respect the privacy of its students by not involving them in this labor relations problem. After the hearing, the Executive Director rejected this position and held that the District had a duty to disclose the names of the students involved, which he ordered to be done.[4]

In all events, the Executive Director concluded that there existed no privilege that protected the disclosure of the students names in this instance; that there was on the contrary a right on the part of the Association to access all non-privileged information relevant to its member's grievance, so that it could fulfill its statutory duties of fair representation. Thus he concluded that disclosure was mandated and that, in withholding

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[3]One set of notes reflects that Briggs makes "nasty comments everyday" and gives examples: *See* Stipulation of Facts at Exh. E.

[4]The Executive Director's decision appears to evidence rather deep suspicion of the District. For example, (*see also* footnote 2) the decision notes that the students "were individually interviewed on two (2) occasions without prior notice [to their parents] first by the Building Principal and second, by the Director of Human Resources". The decision goes on: "The rank of these administrators alone created an unequal environment, placing the students at a perceived if not real disadvantage." Decision at 7. One is puzzled, however, to know what interest of the student's was thought to be put at risk by the possibility of perceived differences in rank, in the circumstances of this incident? And if an administrative practice designed to protect students (having parents present at interviews in sexual harassment) was deviated from here because the administrators thought that the circumstances did not offer a threat to students, how does second-guessing that determination by PERB relate to legitimate labor-management relations or the interest of Mr. Briggs? Apparently the inference sought to be drawn is that perhaps two officers of the District conspired to mislead or misrepresent the very simple facts that they noted in their separate interviews, which facts are not inconsistent with the other conduct of Briggs on October 11 and December 21.

these names, the District had been guilty of an unfair labor practice in violation of Subsections (a)(1) and (a)(5) of 14 *Del.C.* §4007.[5] The remedy stated was that the District "is to immediately provide...the Association with the names of the students involved and the witnesses to the alleged incidents of sexual harassment occurring on December 19, 1994 and October 11, 1994, and any other incidents resulting [in] the three (3) day disciplinary suspension of Mr. John Briggs." That determination was summarily adopted by the PERB on June 12, 1995 and this appeal followed.

For the reasons set forth below I conclude that the Executive Director was mistaken in concluding that there is no privilege attaching to the information sought by the Association. Concluding otherwise, I nevertheless conclude that the District failed to accord to the Association the cooperation required by the Delaware Public School Employment Relations Act, 14 *Del.C.* §4001 *et seq.* (the "Delaware Act"). As described below, the remedy appropriate for that failure, however, is more tailored and limited than that adopted by PERB.

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[5] Those subsections provide as follows:

> (a) It is an unfair labor practice for a public school employer or its designated representative to do any of the following:
>
> > (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
> >
> > * * *
> >
> > (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

14 *Del.C.* §4007; Subsections (a)(1) and (a)(5).

III.

A. Standard of Review:

In reviewing the decision of PERB the Court of Chancery is bound to accept as correct all relevant factual conclusions that are supported in the record by substantial evidence. *Cf.* 29 *Del.C.* §10142(d). Insofar as questions of law bear upon the determination of the issue presented, the Court is required to pass on such issue as in an original matter. *Red Clay Educ. Ass'n v. Board of Educ. of the Red Clay Consolidated Sch. Dist.*, Del.Ch., C.A. 11958, Chandler, V.C. (Jan. 16, 1992) Mem. Op. at 4; *Slingwine v. Industrial Accident Bd.*, Del.Supr., 560 A.2d 998, 999 (1989).

B. Decision Below:

The decision of the Executive Director characterized the question presented as one of first impression. The analysis he employed and thereafter adopted by PERB, had three steps. **First**, it was held, citing a prior PERB ruling, that a covered employer has a duty to cooperate in a "reasonable investigation" by a bargaining agent of the facts surrounding a filed grievance, and specifically in that connection, to afford "access to relevant [non-privileged] information necessary for the bargaining representative to intelligently determine facts...etc." **Second**, it was determined that there was no privilege that protected the disclosure of the identity of the children who reported or confirmed the alleged incidents of inappropriate behavior that form the predicate for the discipline imposed. **Third**, it was held that disclosure of the names was "necessary" in the

circumstances of the case to allow the Association to conduct a reasonable investigation. Thus disclosure of the childrens' names was ordered.

Even though he concluded that there was no privilege protecting disclosure of the identity of the students, the Executive Director of PERB in his decision noted that in his opinion the risks of distress to which the children might be exposed as a result of the disclosure of their identity to the Association were minimal, although there was no evidence presented bearing on this question and any expertise that one may wish to assume for this board could not be thought to extend to the subject of child psychology. In adopting the Director's conclusions the PERB did not condition or limit the use or disclosure of the information that it ordered disclosed.

IV.

This appeal involves a tension between two important social values. The first is the value of fair procedures in the governance of labor-management relations in the field of public primary and secondary education. It is urged by the Association that fair procedures in the administration of the Delaware Act necessitates in this instance the disclosure of the names of the children who complained about Mr. Briggs' conduct. Certainly, if no consideration other than the degree of assurance that Mr. Briggs and the Association might have that the three day disciplinary suspension here imposed was imposed for reasons that constitute good cause, then one would by all means direct that

Mr. Briggs should have access to the information needed to provide that assurance. Another value however is involved of necessity.

The second, conflicting value implicated by these facts, of course, is the privacy interest of students. On this appeal, as before the PERB itself, legal protection of that value is said to arise at least from the terms of the federal Family Educational Rights and Privacy Act of 1974, ("FERPA") 31 U.S.C. §1232g. While I conclude that important privacy interests are at stake I do not find those interests arise from the federal statute.

In attempting to resolve this conflict I follow the lead of the parties by asking first whether the information sought qualifies as protected confidential information under the Federal Act. For the reasons explained below I conclude that it does not.

A. Obligations of the School District Under FERPA.

A principle purpose of FERPA was the deterrence of indiscriminate releasing of student educational records. *Bauer v. Kincaid,* 759 F.Supp. 575, 591 (W.D.Mo. 1991). The Act however did not directly prescribe or regulate such release, however.[6] FERPA imposes a penalty for doing so:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization,....

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[6]Such a direct prohibition would arguably raise questions of constitutional power. *Cf. U.S. v. Lopez,* 115 S.Ct. 1624, 1633 (1995).

20 U.S.C. §1232g(b)(1)(Supp. 1995). This approach recognizes that under our constitution, states and local communities have the principal legal responsibility for the creation and operation of schools. FERPA does not purport to alter this balance of powers.

Thus, while FERPA opposes no direct obligation on schools, it does impose a binding obligation on the government unit that accepts designated federal funds. *See Belanger v. Nasua, New Hampshire, School District,* 856 F.Supp. 40, 46 (D.N.H. 1994). "The language of FERPA reveals a congressional intent to impose obligations directly on educational agencies or institutions." *Belanger,* 856 F.Supp. at 46; *Maynard v. Greater Hoyt School District,* 876 F.Supp. 1104, 1107 (D.S.D. 1995)("FERPA does establish mandatory and direct obligations regarding education records on school districts that receive federal funds." *Id.*). Having elected to receive funds subject to the strictures of FERPA, the Colonial School District incurred a duty to abide by the terms of their receipt.

B. Not All Information Reflected In School Records Is Therefore An "Education Record" Under FERPA.

Although the District must abide by the obligations and constraints imposed by FERPA, in regulating the disclosure of school records FERPA does not prohibit disclosure of all information that may appear in school records. Section 1232g(a)(4)(A) defines "educational records" as being documents or materials: "those records, files, documents, and other materials which (i) contain information directly related to a student, and (ii) are maintained by an educational agency or institution or by a person acting for such agency

or institution." 20 U.S.C.A. §1232(a)(4)(A)(1990). (emphasis added). The District argues that the information sought by the Association in this case--the names of the student victim and witnesses--falls within this broad definition because it is reflected on papers (notes) created by school officials. The Association on the other hand characterizes the names as "directory information" which is excepted under the statute from the general disclosure prohibitions. *See* 20 U.S.C.A. §1232g(b)(2)(1990); 20 U.S.C.A. §1232(5)(A)(1990)("[T]he term 'directory information' relating to a student includes the following: *the student's name*, address, telephone listing, [etc.]...." *Id.* (emphasis added)). To this end, the Association cites *Staub v. East Greenbush School District No. 1*, 491 N.Y.S.2d 87 (N.Y. Supr. Ct., Spec. Term 1985) in which the court held that the names and addresses of student witnesses to an accident were not protected from disclosure by FERPA.

In my opinion, the names sought in the present case are not "educational records" because in no event do they constitute a file, document, paper, etc. Alternatively the information, while it is student-sensitive, does not concern distinctively educational matters.[7]

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[7] In *Staub, supra,* the request for the names of student witnesses did not implicate any personal or sensitive information. There, a plaintiff injured during a gym class requested the names and addresses of all students in that class and an attendance list of students for the day the accident occurred. Disclosing the names therefore revealed only that certain students were enrolled in a particular class and present on a particular day. Furthermore, the *Staub* court did not specify that the requested information constituted directory information. In fact, since "personally identifiable information in education records" can be disclosed under subpoena, 20 U.S.C.A. §1232g(b)(2)(B)(Supp. 1995), and a subpoena for documents can typically be issued to third parties, the force of this holding escapes me.

Here the information sought only coincidentally is reflected in some records. If no record had been created after the student complained, but discipline was imposed, the same claim could be made for the same purpose. Alternatively while this information is certainly personal, courts have suggested that in order to constitute "educational records" under FERPA, the content of the records have some tie to some aspect of the educational process. *See Bauer v. Kincaid,* 759 F.Supp. 575 (W.D.Mo. 1991); *Belanger,* 856 F.Supp. at 50. For example, in *Bauer v. Kincaid,* 759 F.Supp. 575 (W.D.Mo. 1991) it was noted that "[t]he function of the statute is to protect *educationally related* information." *Id.* at 591 (emphasis added). In holding that FERPA does not prohibit disclosure of criminal investigation and incident reports to a third party, the court explained:

> It is reasonable to assume that criminal investigation and incident reports are not educational records because, although they may contain names and other personally identifiable information, such records relate in no way whatsoever to *the type of records which FERPA expressly protects; i.e., records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files.*

Id. (emphasis added). The court elaborated on the type of information expressly protected under FERPA:

> FERPA protects as confidential, information which a student is required to provide or divulge in conjunction with application and attendance at an educational institution. FERPA also protects academic data generated while an individual is a student at an eduction institution.

Id. at 590.

The names of the victim in and witnesses to an alleged incident of sexual harassment by a teacher does not relate closely enough with the educational process to warrant the statutory protection of "educational records" in FERPA. This does not mean

the law does not offer protection, but that this federal statute does not. The information here sought is akin to information contained in "[c]riminal investigative reports...specifically excluded from the educational records which FERPA protects[,]" *Bauer*, 759 F.Supp. at 590. The *Bauer* court held that criminal investigative reports that did not satisfy all statutory requirements for the law enforcement exception nevertheless did not constitute educational records. *Id.* The court there based this determination on factors similarly applicable in the present case: the information did not constitute "educationally related information" or "the type of records which FERPA expressly protects; *i.e.*, records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files." *Id.* at 590-91.

Although this interpretation does not afford complete federal law protection of the privacy interests of children and families, students have recourse to other state law protections or privileges against disclosure (*e.g.*, doctor-patient and psychologist-patient privileges) more directly tailored to information potentially kept by schools in record form, but not within the broad sweep "educational records." In the following section I consider the applicability one such protection--the common law right of privacy.

V.

A. Does Failure to Disclose The Students' Names Constitute an Unfair Labor Practice?

It does not follow from the conclusion that FERPA does not require non-disclosure of the identity of the students on these facts that such non-disclosure constituted a violation

of a right of the Association under the Delaware Act or, stated differently, that it constituted an "unfair labor practice". *See* Delaware Public School Employment Relations Act (the "Delaware Act"), 14 *Del. C.* §§4007(a)(1) and (5)(1993).[8]

The Delaware Act creates a structure within which labor/management relations in public education may be governed. The Act requires employers to recognize collective bargaining agents and mandates collective bargaining, *see* 14 *Del. C.* §§4004, 4010-13, 4018; it prohibits strikes and enumerated acts that constitute unfair practices, *see* 14 *Del. C.* §§4007, 4016-17; and it affords a process for the resolution of disputes arising out the employment relation, including the resolution of workplace grievances. *See* 14 *Del. C.* §§4006, 4008-09, 4014-15. Under this scheme, PERB has held that an employer (*e.g.*, the District) must provide relevant, non-privileged information necessary for a collective bargaining representative such as the Association to fulfill its statutory duty to represent bargaining unit members, *see Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School District Board of Education*, Del. PERB, U.L.P. No. 85-06-005, Slip. Op. at 19-20 (Feb. 5, 1986):

> The statutory duty of representation necessarily encompasses the right to conduct a reasonable investigation which, if not otherwise privileged, includes access to *relevant* information *necessary* for the bargaining representative to intelligently determine facts, assess its position

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8 (a) It is an unfair labor practice for a public school employer or its designated representative to do any of the following:

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter,

. . .

(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative or employees in an appropriate unit,....

14 Del. C. §§4007(a)(1) and (5).

> and decide what course of action, if any, to pursue. The duty to furnish such information extends beyond the negotiations to the day to day administration of the collective bargaining agreement. To conclude otherwise would render the entire representation process meaningless.

Id. (emphasis added).[9]

It is this obligation that forms the premise for the claim by the Association that the District has engaged in an unfair labor practice by refusing to identify the children involved in the alleged December 19 incident.

The Association complains that without the names of the alleged victim and witnesses it does not have sufficient information to "intelligently determine facts, assess its position and decide what course of action, if any, to pursue." *Brandywine Affiliate*, Slip. Op. at 19. Certainly the identity of the children whose testimony provided the basis for Briggs' suspension is relevant in the Rule 26(b) sense of possibly leading to the uncovering of admissible evidence.

The right to access to relevant information is not, of course, absolute. It is subject to privileges that may arise from threats to other legally protectible interests. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956); *Chancery Rule* 26(c). Acting in the labor relations context, courts have recognized that the duty of disclosure can be affected by countervailing privacy interests. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318-

[9] *See generally NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967)(holding that a private sector employer has a general obligation to provide information that is needed by the bargaining representative for proper performance of its duties).

19 (1979)(involving disclosure of psychological aptitude test scores); *Shell Oil Company v. N.L.R.B.*, 457 F.2d 621 (1972)(involving claimed right to disclosure of names including those of nonstriking and nonunion employees, to the union).

Are there legitimate privacy interests at stake in this case, despite the fact that in my opinion federal law does not apply to the disclosure in question? In my opinion the answer must be in the affirmative. *See generally* PROSSER AND KEETON ON TORTS, §117 at 856-59 (1984). Certainly the District bears a special responsibility to protect and educate children while in the District's schools. This responsibility includes the responsibility to take reasonable steps to protect children from foreseeable harm and to take such steps as are feasible and prudent to advance the education of children in its schools. It can hardly be doubted that, at least in many contexts, for a child to be involved to any extent in a controverted teacher disciplinary proceeding would not be beneficial to the child. It would at the very least be powerfully distracting and at the worst a cause for serious distress. Should the student's identity be known to the Association, there are possible risks to the child that responsible teachers and administrators could not simply ignore. Word could sneak out to the school and the child might be treated as a curiosity by schoolmates or even the object of fun; the accused teacher could send embassaries or could himself seek to persuade the child against further revelation. Such contacts could be frightening. Although the underlying allegations against Mr. Briggs rest on relatively mild facts, the possible risks to children must be considered first by

responsible teachers and school administrators and ultimately by parents, not by PERB unaided by evidence *see supra* at p. 9).

Thus, when student-sensitive information is relevant to the assessment by the Association of a filed grievance,[10] the determination of what such relevant information is appropriately disclosed and under what circumstances will of necessity require a case by case determination. *Cf. Green v. Board of School Commissioners of City of Indianapolis,* 716 F.2d 1191 (7th Cir. 1983).[11] Inevitably the first such determination will be that of the District and of parents. If the district, after consultation with parents, cannot come to agreement about that subject with the Association, the PERB will be required to decide that question in an action of this sort under the Delaware Act, but in such determination PERB will be required to consider and balance the competing legitimate interests of fair representation and of student privacy, and should be careful in that context to afford some weight and respect to any professional judgments made by the District or decision made by parents concerning the welfare of children. If the matter cannot thus be resolved this court will be required on a case by case basis to resolve the balance between legitimate

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[10]By student-sensitive information, I mean information whose disclosure, in the reasonable, good faith judgment of the professional staff of the school or district, entails a material risk of injury to the interests of a student.

[11]Acknowledging the privacy concerns of alleged victims and witnesses to sexual harassment by a bus driver, the court there held that the school district did not need to disclose the identity of adverse witnesses in a termination hearing if the district otherwise provided adequate safeguards to insure reliability of the information obtained from those sources. In finding that the school district in that case complied with due process requirements, the court noted that the school relied on the following safeguards: (1) the witnesses gave statements to a police investigator employed by the school board, (2) the witnesses were interviewed individually based on pre-scripted questions, and (3) the witnesses prepared written statements that were later reviewed and signed by their parents.

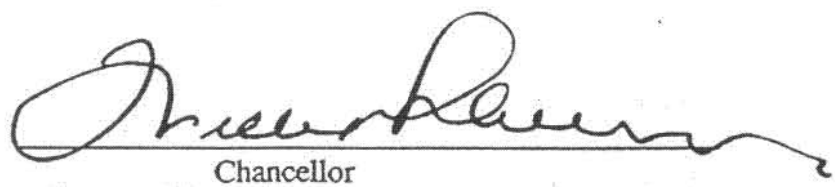
privacy claims and the need for access to information relevant to the processing of a grievance. In that connection among the factors to be considered will be specific interests of the child at stake, and the nature and extent of threats to those interests; the severity of the discipline that is being grieved; and the availability of alternative means to provide some assurance or opportunity for greater information without risking inappropriate intrusion into important interests of the child.

In this instance the District interviewed each child twice, independently, and offered Mr. Briggs a copy of the interview notes. It did not however use pre-scripted questions when interviewing the victim and witnesses, nor did it involve the parents in the interview process, or seek their permission to disclose the identity of the children or themselves to the Association, so that the Association could talk to the parents (under a commitment not to disclose that information to Mr. Briggs, without their permission).

Consent by the parents of the children after consultation with the District to the disclosure of the students' names (with presumably a commitment by the Association not to approach the children outside of the presence of the parents) would have obviated the problem. If the parents refused to consent to further involvement by their child it is unlikely that respect for that decision could be deemed an unfair labor practice by the District. The District, however did not allow the parents of the children to exercise that natural guardian's prerogative. It thereby risked perhaps imposing an unnecessary information cost upon the grievance process. While it seems somewhat harsh to label this

failure an unfair labor practice, since it appears to have been a good faith attempt to respond to legitimate responsibilities, that is perhaps a correct legal characterization.

The remedy that PERB imposed however is excessive and does not fit the precise injury presumably effected by the District's failure. It is in my opinion not "an appropriate remedial order" 14 *Del.C* §4008(a). PERB unconditionally required the District to disclose the students' names. That remedy plainly exercises a choice that the child's guardian should make at least in the first instance: whether in all the circumstances the identity of the child should be disclosed and relatedly whether further involvement of the child is consistent with the child's welfare or in his or her best interests. An appropriate remedial order would require that the District do now what it might have done originally to see if the childrens' guardians would consent to a disclosure that might permit the Association to more easily and more reliably determine its course of action with respect to the Briggs' grievance. The District shall within thirty days deliver to the Association a signed statement either identifying the parents of the children involved, with their permission, or stating what efforts were made without success to gain permission to disclose the parents' identity. Any such disclosure made shall be for the use of the Association in the grievance that gave rise to this matter and shall not be disclosed in any other person for any purpose. It is so Ordered.



Chancellor